A "local loop" is a pair of wires, or their equivalent, running from the local central office or switch to the customer's premises. A local loop can be subdivided into at least three components including: (i) Loop Distribution which runs from the customer's premises to a cross connect point known as a feeder/distribution interface ("FDI"); (ii) the FDI itself; and (iii) the Loop Feeder, which are the lines from the FDI to the local loop switch. Complaint, ¶¶ 41-48. A competitor, like MCI, who has some equipment in place does not need access to the entire loop because it can connect directly to loop distribution and bypass the unnecessary portions.

Section 251(c)(3) requires access to unbundled network elements at any technically feasible point. Id. However, this type of access, subloop unbundling, demands a level of technical feasibility which has not been demonstrated. The FCC has concluded that MCI and others seeking subloop unbundling have not overcome incumbent technical feasibility challenges. Specifically, subloop unbundling can lead to disruptions in phone service and degradation of overall service quality. See Local Competition Order, 11 FCC Rcd at 15696, ¶ 391. The SCC properly rejected MCI's similar argument upon Bell Atlantic's showing that it was not technically feasible. Bell Atlantic's witnesses noted spectrum management problems, the need to develop new facilities to accommodate MCI's request and the potential for breakdowns in network operations and security. See, e.g., 12/16/96 Tr. 42, 81, 203-09, Record 3920, 3959, 4081-87 (testimony of Donald Albert).

Despite MCI's argument to the contrary, the SCC's reliance on this information was not arbitrary or capricious. In fact, the SCC protected MCI's interest in access to subloop unbundling by providing for joint subloop unbundling tests in order to identify and alleviate any technical difficulties. See Arbitration Order at 2 (Dec. 20, 1996). The Interconnection Agreement between

MCI and Bell Atlantic includes this provision. See Interconnection Agreement, Attachment III, §4.2, Record 5542.

The Court GRANTS summary judgment for the SCC and Bell Atlantic on this claim.

(3) Directory Assistance

The issue of access to directory assistance information emerges in both MCI complaint and Bell-Atlantic's Counterclaim. MCI contends that the SCC erred in denying nondiscriminatory access to Bell Atlantic's directory assistance data for the District of Columbia and suburban Maryland. Bell Atlantic argues that the SCC erred as a matter of law when it required Bell Atlantic to give MCI possession of its directory assistance database on magnetic tape or some other suitable medium. Under the SCC's Order, Bell Atlantic would also have to provide daily updates. See Petition of MCI, Case No. PUC960113, Order Resolving Non-Pricing Issues, at 7 (May 8, 1997). Both arguments are without merit.

Regarding MCI's claim, the SCC decision to limit access to only Virginia specific data was not arbitrary or capricious. The SCC properly found that its jurisdiction under the 1996 Act was "coextensive with [its] jurisdiction over customers within the Commonwealth" and properly declined to "infringe upon the jurisdiction of other Commissions." Record, pp. 5883-84 (SCC July 16, 1997 Order, pp. 2-3). MCI has initiated proceedings before both the Public Service Commission of the District of Columbia and the Maryland Public Service Commission. Those commissions shall determine MCI's access to directory assistance data for persons within their respective jurisdictions. It is the location of the customer, not the database which is controlling because each state commission regulates intrastate operations of carriers. See 47 U.S.C. § 153 (41). The SCC has no jurisdiction over customers who reside in the District of Columbia or suburban Maryland. MCI may

not undermine those proceedings or raise the likelihood of conflict by securing this information through the SCC.[4]

Next, Bell Atlantic challenges the medium by which it must provide the directory assistance information. Specifically, Bell Atlantic challenges the use of magnetic tape or other suitable medium for delivery of information and would interpret § 251(b)(3) as requiring "read-only" access. Nothing in the 1996 Act requires such a limited interpretation of "access." While read-only access is a highly effective way of providing nondiscriminatory access to directory assistance, it is not the only way to accomplish such access. See Second Report and Order, ¶ 143.

The FCC has expressly ruled that "[a] LEC shall provide directory listings to competing providers in readily accessible magnetic tape or electronic formats in a timely fashion upon request. A LEC must also permit providers to have access to and read the information in the LEC's directory assistance databases." 47 C.F.R. §51.217(c)(3)(ii). In the Second Report and Order, the FCC "conclude[d] that section 251(b)(3) requires LECs to share subscriber listing information with their competitors, in readily accessible tape or electronic formats, and that such data be provided in a timely fashion upon request." Second Report and Order, ¶ 141. Accordingly, the SCC properly interpreted and applied the requirements of § 251(b)(3).

The Court GRANTS summary judgment for the SCC, MCI and AT&T on this issue.

(4) Access to Feature Availability Matrix and Street Access Guide Database

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[4]Indeed, nothing requires or authorizes the SCC to grant access to such broad information. The FCC Second Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 19392 (1996) ("Second Report"), ¶ 137 defines "directory listings" as "subscriber list information" which is more limited than Bell Atlantic's entire directory assistance database.

A switch offers customers different options such as call waiting. Feature Availability Matrix and Street Access Guide data ("FAM/SAG") identifies the features each switch is capable of supporting and the street addresses it serves. By providing information on which features it may sell a potential customer, this information enables a competing local exchange carrier to market products more effectively. It is a "network element" since it is a "database. . . and information . . .used in the transmission, routing or other provision of telecommunications service." 47 U.S.C. § 153(29). Accordingly, Section 251(c)(3) requires nondiscriminatory access.

Although, MCI would prefer to receive this information via a database download, access through the Electronic Communications Gateway ("ECG") is consistent with the 1996 Act. In its First Report and Order, the FCC indicated that nondiscriminatory access "includes access to the functionality of any integral gateway system the incumbent employs in performing the above functions for its own customers." First Report and Order, ¶ 523. The Record indicates that MCI would be given access to this information on the same basis as Bell Atlantic's service representatives.[5] Hence, it is not discriminatory.

There is no obligation on the incumbent LEC to provide superior quality interconnection and unbundled access. See Iowa Utilities Bd. v. F.C.C., 120 F.3d 753, 813 (8th Cir. 1997)(-[T]he fact that incumbent LEC's may be compensated for the additional cost involved in providing superior quality interconnection and unbundling access does not alter the plain meaning of the statute, which,

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[5]"Bell Atlantic is going to make that information available exactly as we do for our own service representatives, exactly as our own service representatives can access the operations systems to use that information in the pre-ordering phase of things." 2/19/97 Tr. at 165, Record, p. 4602; "We'll make the information available exactly the way it's available to our reps." Id. at 168, Record 4605. "What we are providing through ECG is the exact same capability to request and use this information as what our people can." Id. at 169, Record, p. 4606.

as we have shown, does not impose such a burden on the incumbent LECs). Bell Atlantic testimony revealed: (1) the preferred database does not exist in a single place; (2) creating it would be expensive and (3) MCI could create such a database through ECG access. 2/19/97 Tr. 166-67, 171, Record 4603-04, 4608; 2/19/97 Tr. 235-36, Record 4672-73. The 1996 Act does not impose these obligations on the incumbent LEC and the SCC's Order is in full compliance with the 1996 Act in this regard.[6]

The Court GRANTS summary judgment for the SCC and Bell Atlantic on this issue.

B. Performance Measures, Performance Standards, Reporting and Noncompliance Compensation

To ensure compliance, MCI endeavored to secure certain objective performance standards, specific performance reports, and enforcement mechanisms. The SCC considered MCI's claims and adopted provisions similar to those MCI requested in its brief to the SCC.[7] The SCC's decision enacted the following measures: (1) Bell Atlantic shall provide services to MCI at the same level of performance Bell Atlantic provides itself; (2) Bell Atlantic shall offer premium service to MCI if MCI requests it and compensates Bell Atlantic for the incremental cost of providing the premium service; (3) Bell Atlantic shall provide reports to MCI on all material measures of service parity; (4) MCI may request a report on all measures that are reasonably related to establishing parity level and

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[6]The SCC did not completely preclude access in MCI's preferred data download manner. Pursuant to the SCC Order, should Bell Atlantic develops the capacity to furnish this data as requested by MCI, or if the provision of such data is consistent with industry standards, Bell Atlantic must furnish it at a price no higher than its incremental cost. Record, pp. 5421-22 (SCC may 8, 1997 Order, pp. 5-6).

[7]Bell Atlantic's Brief in Opposition to Motions of MCI, AT&T and SCC for Summary Judgment offers a thorough comparison of measures MCI requested below and the resulting SCC decision. Id. at p. 18.

whether MCI is receiving services at parity; (5) CLECs shall bear the incremental costs, allocated on a competitively neutral basis, of providing any reports that Bell Atlantic does not provide for internal use or is not obligated to provide for regulatory purposes; and (6) MCI shall have the right, at its expense, to conduct reasonable audits or other verifications of information provided by Bell Atlantic. Order at 6 (May 8, 1997), Record 5422. Nonetheless, MCI claims that the SCC refused to impose any meaningful performance requirement on Bell Atlantic. MCI Mem., p. 30.

MCI offers a four part basis for this claim. First, the Interconnection Agreement's failure to reduce parity requirements to concrete terms undermines its effectiveness. Next, MCI contends that it must have reports from Bell Atlantic to show that Bell Atlantic is meeting its performance obligations. Third, MCI objects to having to pay for performance reports. Finally, MCI claims that compliance incentives and disincentives for discrimination must be built into the contract to ensure Bell Atlantic complies. MCI's argument in support of these claims is unavailing.

First, the 1996 Act enables State commissions to enforce State law in its review of an agreement, §252(e)(3), but does not explicitly require particular standards of performance. The FCC similarly declined to require specific performance standards and reporting requirements. First Report and Order, ¶¶ 310-11. Instead, the FCC chose to allow states to adopt such requirements based on its own discretion. See id. Toward this end, the SCC adopted suitable performance standards.

With regard to performance reports, Exhibit A to Attachment X to the Agreement lists reports MCI would like to receive. Record, pp. 5869-5869.2. MCI may receive each of these reports and others it may wish to examine. Record, p. 5853. Moreover, MCI has a right to audit Bell Atlantic's data used in preparing the reports. Record, p. 5497 (Agreement, Section 34.5). The SCC places the

Cost of these reports on MCI pursuant to §251(d)(1)(A) which requires ILECs to provide unbundled access and interconnection to CLECs on a non-discriminatory basis, at a price based on the ILEC's cost. The 1996 Act does not require ILECs to provide these reports to CLECs free of charge and the SCC properly declined to impose the cost on Bell Atlantic. Finally, the absence of incentives for compliance and disincentives for breach does not impair the effectiveness of the Interconnection Agreement. MCI may activate the breach provisions within the Agreement which includes dispute resolution procedures, actions at law and equity for damages and injunctive relief. Record, p. 5479.

The Court GRANTS summary judgment for the SCC and Bell Atlantic on this issue.

C. Intellectual Rights and Intellectual Property Indemnification

MCI contends that the SCC improperly failed to require transfer of intellectual property rights and intellectual property indemnification. MCI has no way of assessing intellectual property risks it may incur upon using Bell Atlantic's existing network to provide local service. Consequently, MCI sought assurances that it could purchase network elements without being exposed to intellectual property based litigation. The SCC required Bell Atlantic to indemnify MCI for intellectual property claims as to any new equipment and software. The SCC further required Bell Atlantic to extend to third parties any indemnities Bell Atlantic's vendors of equipment and software provide. Finally, the SCC ruled that Bell Atlantic will inform MCI of any pending or threatened intellectual property claims and update this notification periodically. Record, pp. 5418-19 (SCC May 8, 1997 Order, pp. 2-3).

Standing requires, in part, a party to have suffered an "injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2136 (1992)(internal citations and

quotations omitted). In this case, there is no evidence of either actual or imminent harm. When asserting third-party rights, standing requires a showing that the third party is unable to represent its own interests. See Powers v. Ohio, 499 U.S. 411 (1991). There is no evidence that Bell Atlantic's vendors will be unable to prosecute their own interests; therefore, any attempt by MCI to enforce the rights of owners of intellectual property is premature.

The Court hereby DISMISSES this claim WITHOUT PREJUDICE.

D. MCI's Collocated Remote Switching Modules[8]

A remote switching module ("RSM") takes calls from the incumbent's system and, when necessary, routes them to the new entrant's switch, which in turn routes them for delivery. MCI. Mem. p. 38. The RSM can also switch calls directly to its destination if the terminating caller is served by the same end office in which the RSM is located. Id. Although the SCC required Bell Atlantic to permit MCI to collocate RSMs on its premises, the Interconnection Agreement precludes MCI from using its collocated RSMs for switching. Record, P. 5715 (Agreement, Attachment V--Collocation), MCI contends that this provision violates the 1996 as a matter of law.

Section 251(c)(6) limits the duty to collocate to the equipment placed on ILEC premises that is "necessary for interconnection or access to unbundled network elements[.]" Id. There is no duty, however, to provide enhanced services under § 251(c)(6). First Report and Order, ¶581. Incumbent LECs are not required to allow collocation of any equipment without restriction. Id. With regard to switching, the FCC declined to require that switching equipment be collocated since it does not

[8]AT&T raised this identical count in its complaint and cross-claim. The Court shall dispose of AT&T's claim along with MCI's similar claim. References to MCI shall be understood to include AT&T.

appear that it is used for the actual interconnection or access to unbundled network elements. Id. The Interconnection Agreement implements the 1996 Act and FCC regulations by requiring collocation as necessary for interconnection and access to unbundled elements. MCI's cost based analysis for removing the SCC's restriction, Record, pp. 4027-4030, is not "necessary" within the purview of the statutory framework because it is an enhanced feature. Bell Atlantic is under no statutory duty to allow MCI use collocated RSMs for switching. See 47 C.F.R. § 51.323(c) ("Nothing in this section requires an [ILEC] to permit collocation of switching equipment or equipment to provide enhanced services.")

Accordingly, the Court GRANTS summary judgment for the SCC and Bell Atlantic on this issue.

E. Rates for Nonrecurring Charges

Nonrecurring charges are the onetime cost of initiating service to a customer. It is the price new competitors pay to enter the local telephone market. MCI did not present any proposed prices for these non-recurring charges. Record, p. 3819 (SCC Staff Report, p. 85). This may be attributed to its December 13, 1996 stipulation with Bell Atlantic "to handle this issue as outlined in the Commission's ruling in the arbitration case involving AT&T[.]" Record, p. 3846 (Stipulation between MCI and Bell Atlantic, p. 7). The effect of this stipulation precludes MCI from raising the issue now.

This Court may not consider alleged errors not raised to the administrative agency below. See Pleasant Valley Hospital, Inc. v. Shalala, 32 F.3d 67, 70 (4th Cir. 1994). The SCC set prices for non-recurring charges in its December 2, 1996 Order. Prior to its entry of the stipulation, MCI had presented arguments on the issue of non-recurring charges. However, in a practical sense, MCI

abandoned those claims when it voluntarily agreed to abide by the results of the AT&T-Bell Atlantic arbitration issue over one week later.

The Court FINDS that MCI's claim is procedurally barred because of its failure to raise the claim to the SCC below. MCI should have declined to enter the stipulation since its claims had not been resolved. MCI may not avoid the legal effect of its actions on appeal.

F. Transport and Termination Rates

Bell Atlantic contends, without merit, that the SCC erred as a matter of law when it set AT&T's and MCI's termination rates based on Bell Atlantic's rates for the equivalent service. Sections 252(d)(2)(A)(ii) and 252(b)(4)(B) permit the establishment of transport and termination rates based on a reasonable approximation. This approximation was essential because there was no actual cost data available. New entrants such as MCI have yet to begin offering widespread local service; therefore, they do not have any historic cost data to assist in setting transport and termination by reference to actual cost. Moreover, Bell Atlantic urged the SCC to use its cost as a proxy for new entrants by advocating a "blended rate" for termination. Bell Atlantic is precluded from challenging the SCC's use of its costs as a proxy for new entrants as arbitrary and capricious.

The 1996 Act allows approximations based on the "best information available ~~to~~ [a state commission] from whatever source derived." § 252(b)(4)(B). In this case, the SCC considered the cost data available, namely the cost Bell Atlantic claimed it would incur for transporting and terminating traffic over a given distance. The SCC properly considered differences in the MCI and the Bell Atlantic model before setting rates for transport and termination at $.005 per minute when MCI switch serves a geographic area comparable to the area served by Bell Atlantic.

The 1996 Act authorized the SCC to make an approximation based on the information available to it. The SCC properly relied on Bell Atlantic's cost study as a proxy for determining costs to new entrants. The Court GRANTS summary judgment for the SCC, AT&T and MCI on this issue.

G. Prices for Directory Listings

Again, a "network element," is "facility or equipment used in the provision of a telecommunications service" including "features, functions and capabilities that are provided by means of such facility or equipment." 47 U.S.C. § 153(29). One network element is the local switching element which the FCC defines as including "the same basic capabilities that are provided to the [ILEC's] customers, such as a telephone number, directory listing . . . and operator services[.]" First Report and Order, ¶ 412. In the case at bar, the parties dispute whether directory listings are network elements within the meaning of 47 U.S.C. § 153(29).

The Court FINDS that directory listings are network elements. Both the Act and FCC regulations define network elements and include directory listing services. As the Eight Circuit notes in Iowa, the term "network element" encompasses both the physical components of a network as well as "the technology and information . . . necessary to provide telecommunications for a fee directly to the public." Iowa, 120 F.3d at 808. The FCC has ruled that directory assistance and operator services be unbundled as separate network elements. First Report and Order, ¶ 534. Accordingly, the SCC properly required Bell Atlantic to make them available to AT&T based on the cost of providing it. See 47 U.S.C. § 252(d)(1).

The absence of cost studies for these services required the SCC to make a reasonable approximation based on the best information available to it. See 47 U.S.C. § 252(b)(4)(B). In

setting interim prices for this network element, the SCC considered Bell Atlantic's tariff rate and discounted it by the wholesale discount rate. This determination was not arbitrary or capricious inasmuch as it was based on the best information available to the SCC.

H. Wholesale Discount Rate

Bell Atlantic and other incumbent LECs must "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4). Section 252(d)(3) provides a formula for calculating wholesale rates. "A State commission shall determine wholesale rates on the basis of retail rates charge[d] to subscribers for the telecommunications services requested, excluding the portion thereof attributable to any marketing, billing, collection and other costs that will be avoided by the local exchange carrier." 47 U.S.C. § 252(d)(3). The FCC has interpreted the statute to exclude those costs that will be avoided by a reasonable incumbent selling at wholesale. See First Report and Order, ¶ 911.

The SCC adopted two interim wholesale rates. The wholesale discount rate is 21.3% for telecommunications services sold to competitors for resale. See Wholesale Order, pp. 5-6 (Nov. 8, 1996); Amending Order, pp. 1-2 (Nov. 13, 1996). When Bell Atlantic furnishes directory assistance and call completion services, the wholesale discount rate will be 18.5%. See id. The Record supports the SCC calculation of these wholesale discount rates. First, Bell Atlantic's expert endorsed the use of "reasonably avoidable costs." Wholesale Order, p. 3 (November 8, 1996). Consequently, Bell Atlantic may not challenge the SCC use of these costs. See Pleasant Valley Hospital, 32 F.3d at 70 (court's review of administrative decision limited to errors raised below).

Second, Bell Atlantic used the "wholesale only" model in the proceedings before the SCC. Record, p. 9423-24, 26, 28.

The Court must uphold the SCC's determination of the wholesale discount if "based on consideration of the relevant factors," absent a clear error of judgment. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). The SCC's November 8, 1996 Order reveals its methodical approach to determining the percentage of avoidable costs it deemed appropriate. Moreover, the SCC approach is wholly consistent with the requirements of the 1996 Act. Having considered "the record and the briefs" prior to reaching its decision, the SCC's determination is not arbitrary or capricious.

The Court GRANTS summary judgment for the SCC on this issue.

CONCLUSION

For the reasons stated above, the Court GRANTS summary judgment in favor of the SCC on all counts. The SCC has complied with the requirements of the 1996 Act and has neither erred as a matter of law nor made arbitrary or capricious findings of fact. To the extent any party advocates a position contrary to the SCC, the Court DENIES relief.

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record.

And it is SO ORDERED.

James R. Spencer
UNITED STATES DISTRICT JUDGE

July 1, 1998
DATE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

U S WEST COMMUNICATIONS, INC., Plaintiff, v. MFS INTELNET, INC., et al., Defendants.	NO. C97-222WD ORDER ON MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

This action is brought by U S West Communications, Inc. ("US West") pursuant to the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 252(e)(6), for judicial review of an agreement approved by the Washington Utilities and Transportation Commission (the "WUTC") concerning interconnection between US West and MFS Intelenet, Inc. ("MFS"), an entrant into a local telecommunications market. The defendants are MFS and the WUTC and its commissioners. The Federal Communications Commission ("FCC") has filed a brief amicus curiae.

Pursuant to the Act, entrants into a local telecommunications market may demand the following from an incumbent local exchange

carrier ("LEC"): (1) interconnection with its local network; (2) access to its individual "network elements", such as routers and switches, "at cost"; and (3) at wholesale, rights to the services the incumbent LEC offers its customers at retail. 47 U.S.C. § 251(c)(2)-(4).

On February 8, 1996, NFS requested access negotiations with US West. The Act requires both parties to negotiate in good faith. 47 U.S.C. §§ 251(c)(1), 252(a)(1). When negotiations failed to produce an agreement, NFS requested, and was afforded, arbitration as authorized by the Act. 47 U.S.C. § 252(b). An arbitrator was appointed, held hearings, and issued a decision. On December 9, 1996, the parties submitted an interconnection agreement reflecting the arbitration decision. The WUTC approved the agreement on January 8, 1997. Following that approval, US West brought this action pursuant to 47 U.S.C. § 252(e)(6), which provides:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

All parties have moved for summary judgement. The materials filed, and the arguments of counsel heard on December 4, 1997, have been fully considered. Because there is no genuine issue of material fact for trial, the case may be decided on summary judgment as a matter of law pursuant to Fed. R. Civ. P. 56.

II. SCOPE AND STANDARD OF REVIEW

While the Act, at section 252(e)(6), authorizes judicial review of "the agreement," review necessarily extends to "the various decisions made by the [state commission] throughout the arbitration period which later became part of the agreement . . . ." GTE South, Inc. v. Morrison, 957 F. Supp. 800, 804 (E.D. Va. 1997).

As to the record to be reviewed, the Supreme Court has held that "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed . . . consideration is to be confined to the administrative record and . . . no de novo proceeding may be held." United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963). Moreover, the Act was intended to facilitate the rapid entry of new competitors into local telecommunications markets. See Iowa Utilities Bd. v. FCC, 120 F.3d 753, 791 (8th Cir. 1997). That intent would be frustrated by the reception of new evidence in the reviewing court. Review is thus limited to the administrative record.

As to the standard of review to be applied, a state agency's interpretations of federal law are reviewed de novo. See Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495-96 (9th Cir. 1997). Chevron deference (see Chevron USA v. Natural Resources Defense Council, 467 U.S. 837 (1984)), is not appropriate where as many as fifty state commissions will be applying the Telecommunications Act. Questions of federal law will be reviewed de novo.

The WUTC's findings of fact are a different matter. Substantial deference should be afforded to a state commission's findings because the Act gives it original jurisdiction in the area of rate-setting. See 47 U.S.C. §252(c)(2). Principles of judicial discretion are strongest where the administrative body has primary jurisdiction over the precise matters the court is asked to decide. See West Coast Truck Lines, Inc. v. Weyerhaeuser Co., 893 F.2d 1016 (9th Cir. 1990).

Iowa Utilities Board v. FCC makes clear that the state commissions have original jurisdiction over the setting of prices, including discretion to choose the methodology for calculating cost, as long as the terms of the Act are not violated. 120 F.3d at 794. The Eighth Circuit rejected an FCC order requiring state commissions to apply so-called TELRIC methodology to determine prices; the FCC may not "preempt any state pricing regulation that would employ a different methodology." Id. at 798, n. 19.

The choice of pricing and cost methodology thus rests with the commission. Its determinations in those respects must be treated as fact findings and reviewed to test whether they are arbitrary and capricious. With that deferential standard, a reviewing court under the Administrative Procedures Act (analogous here) is to consider whether the agency's decision was based on consideration of the relevant factors and whether there has been a clear error of judgment. See City of Carmel-by-the-Sea v. United States Dep't of Transp., 95 F.3d 893, 899 (9th Cir. 1996). The court may not substitute its judgment for that of the agency. Id.

III. SPECIFIC CLAIMS

The prices set in the agreement approved by the WUTC are interim prices; that is, they are subject to change during the agency's generic price and cost proceeding. It has not been shown that the WUTC used any erroneous interpretation of the Act. As to US West's specific claims:

1. The WUTC's approval of the interim unbundled loop price of $13.37 was not arbitrary or capricious. This price was chosen based on substantial information, including the WUTC's "Fifteenth Supplemental Order", Docket No. UT-950200 (recommended price: $13.38), US West's proposed tariff in another proceeding, Docket No. UT-941464 (maximum proposed price: $19.24), and the FCC's proposed proxy price for Washington ($13.37), See First Report and Order, Implementation of the Local Competition Provisions in the Telecommunication Act of 1996, Appendix B, CC Docket No. 96-98 (Aug. 8, 1996), 11 FCC Rcd 15499, at ¶¶ 788-794 (hereinafter "FCC Order").

US West argues that the WUTC violated section 252(d)(1) of the Act by referring to a "rate-of-return or other rate based proceeding", i.e. the Fifteenth Supplemental Order. But the Fifteenth Supplemental Order was based not on rates of return but on an incremental cost methodology called TSLRIC. See Arbitrator's Report at 9. This is the type of methodology recommended in the FCC Order at paragraphs 630 and 635.

The company also argues that use of the FCC proxy price was improper in light of Iowa Utilities Board v. FCC, 120 F.3d 753

(8th Cir. 1997). The Eighth Circuit held, however, that the FCC did not have jurisdiction to make rules regarding interconnection prices. The decision did not affect the validity of the underlying methodology used by the FCC, which can still be informative. The WUTC made clear it was "free . . . to disregard those specific requirements" if it chose to, and that it was considering the proxy prices for their underlying methodology.

2. The WUTC did not act arbitrarily or capriciously in rejecting US West's request to impose special charges for construction costs and conditioning. It found that US West had offered no evidence of actual construction costs, or of a proper formula to use, or of how costs should be allocated among customers and competitors. WUTC's Order at 16-17.

3. US West has not shown that the agreement violates the Act by permitting "sham unbundling." The Act contemplates that an entrant may provide service to its customers by combining an LEC's network elements. See § 251(c)(3); Iowa Utility Board, 120 F.3d at 814. MFS is not required to provide any of its own elements in order to engage in rebundling. FCC Order at ¶ 328.

US West argues, nevertheless, that the agreement violates the Act by requiring US West to do the rebundling for MFS. The Iowa Utilities case rejected an FCC rule compelling incumbents to recombine network elements for an entrant (see 120 F.3d at 813; amendment to the second Iowa Utilities decision, 1997 WL 658718 (October 14, 1997)), but the reasoning that led to that holding does not apply here. The Eighth Circuit emphasized that compelled

recombination would undermine the difference between wholesale prices for finished service and the "at-cost" price paid for network elements. 120 F.3d at 813. Here, any unfair cost arbitrage is precluded by use of a recombination fee equal to the difference between the cost and the wholesale rate for finished service.

4. The WUTC's approval of a wholesale discount of 21% off retail price was not arbitrary or capricious. The agency relied on the FCC's recommended range of 17-25%. See FCC Order at ¶¶ 932-933. US West's proposal was properly rejected as not complying with section 252(d)(3) of the Act, which requires the parties to start with the retail price and deduct costs avoided ("top down" pricing). The WUTC reasonably characterized US West's method as improper "bottom up" pricing, in which expenses are added together to determine a "wholesale" price.

5. The WUTC's finding that the unregulated and deregulated services are "telecommunications services" was not arbitrary or capricious. The agency correctly applied the Act in denying US West's claim that it is not required to sell unregulated or deregulated services. The Act requires incumbent LECs to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail." 47 U.S.C. § 251(c)(4). The definition of telecommunications services is broad. 47 U.S.C. § 153(46).

6. The WUTC's finding that MFS's switches function as tandem switches more than as end office switches was not arbitrary or capricious. The commission determined the cost of call termination accordingly. In doing to, it did not violate the Act when it relied on approximations of costs submitted by MFS: rates need only be based on "reasonable approximations." 47 U.S.C. § 252(d)(2)(A)(11).

7. The WUTC did not act arbitrarily or capriciously in deciding not to change the current treatment of ESP call termination from reciprocal compensation to special access fees. The decision was properly based on FCC regulations which exempt ESP providers from paying access charges. See 47 C.F.R. pt. 69.

8. The WUTC did not act arbitrarily or capriciously in choosing MFS's proposed division of "switched access charges" for long distance calls which are delivered to the ported numbers of each company. FCC regulations require carriers to share the switched access revenues received for a ported call. First Report and Order and Further Notice of Proposed Rulemaking, Telephone Number Portability, CC Docket No. 95-116 (July 2, 1996), 11 FCC Rcd 8352, at ¶ 140. The methodology employed for sharing access charges is left to the discretion of the commission.

9. The WUTC did not act arbitrarily or capriciously in approving a cost recovery mechanism for number portability based on the number of active local numbers each company has. The FCC has indicated that it approves portability surcharges computed on

that basis. Id. at ¶¶ 130, 136. It is within a commission's discretion to approve a method based on the FCC's recommendation.

10. The WUTC did not act arbitrarily or capriciously in approving NFS's request for a single interconnection point per LATA. The agency correctly applied the Act when it limited its review to the technical feasibility of the LATA connection approved in the agreement. See 47 U.S.C. § 251(c)(2)(B) and FCC Order at ¶ 209. US West's argument that the WUTC had not considered the cost of minimal LATA connections by NFS was correctly rejected. "A determination of technical feasibility does not include consideration of economic, accounting, [or] billing . . . concerns." 47 C.F.R. § 51.5. US West presented no evidence on the issue of technical feasibility of NFS's chosen points of connection.

11. US West's due process claims are without basis. The company has failed to show that any finding of fact was arbitrary and capricious, or that any error of law was committed. Yang v. Shalala, 22 F.3d 213, 217 (9th Cir. 1994), cited by US West, is not controlling because here the arbitrator and the WUTC based their decisions on the evidence submitted by the parties.

In sum, it has not been shown that the WUTC or the arbitrator acted arbitrarily or capriciously, or contrary to law, in making any relevant determination, or that the agreement violates the Act. Accordingly, US West's motion for summary judgment is denied. Defendants' motions for summary judgment are granted except as to the taking claim, discussed below.

IV. US WEST'S TAKING CLAIM

US West claims that the WUTC's approval of the agreement amounts to an unconstitutional taking. A taking claim under the United States Constitution is not ripe until (a) there is a final decision by the state regarding the property; and (b) the plaintiff has attempted to obtain just compensation for the property in state court. Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-97 (1985). These requirements are not met here, and the taking claim, because it is not ripe, must be dismissed without prejudice.

V. CONCLUSION

For the reasons stated, defendants are awarded summary judgment as to all claims except US West's taking claim, which will be dismissed without prejudice. Judgment will be entered accordingly.

The clerk is directed to send copies of this order to all counsel of record.

Dated: January 6, 1998.

William L. Dwyer
United States District Judge

United States District Court

WESTERN DISTRICT OF WASHINGTON

U S WEST COMMUNICATIONS, INC.,

Plaintiff,

V.

MFS INTELENET, INC., et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C97-222ID

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is entered for defendants.

1-7-98
Date

BRUCE RIEKEN
Clerk

Rhonda Shier